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VARA'S ORPHANS: HOW INDIGENOUS ARTISTS CAN STILL LOOK FOR HOPE IN THE MORAL RIGHTS REGIME

Amy L. Skelton\*

INTRODUCTION

Native American artists face many more challenges than traditional American artists when seeking protection for their creative works. This is partly caused by the vast differences between indigenous creative expressions and Western conceptions of art. Native American art takes many forms and is created by diverse people groups. Despite the variety of cultures and geography that Native American art represents, essential similarities exist among indigenous authors when contrasted with Western norms. Native American art is a fundamentally different form of art created in a fundamentally different context, and therefore it needs a fundamentally different form of protection.

Native American artists face three main problems in protecting their work. First, they have not been able to retain an economic benefit from their expressions where an economic benefit is deserved. Second, they have not been able to control the dissemination of their art, whether it is meant to be shared with the public or whether it is meant to be kept private. Third, they have faced economic<sup>1</sup> and cultural dilution of the value of their art

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\* Notes and Comments Editor at the Indiana Journal of Law and Social Equality

1 As author Michael Brown explains, during the twentieth century, "science and technology created a situation in which culture arguably *is* a commodity. The market's restless search for novelty turned unfamiliar folktales, art, and music into exploitable commercial resources." MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 4 (2003).

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through fraud, modification, and unattributed borrowing of their work.<sup>2</sup> Because many Native American communities have used their traditional cultural expressions as a tool to preserve and pass down their culture for centuries, it is vital to remedy not only the economic injustices that are occurring, but also the spiritual and cultural harms as well.<sup>3</sup>

The Native American Graves Protection and Repatriation Act<sup>4</sup> has made strides in helping reunite communities with their cultural artifacts.<sup>5</sup> However, the return of the physical objects to the Native American communities only goes so far. Without protection of the intellectual property comprising the design, the objects can be recreated and traded on the open market as display pieces to museums and collectors,<sup>6</sup> or as children's toys to tourists. For this reason, it is imperative to provide protection for intellectual property in addition to cultural artifacts.

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2 A snapshot of the problems faced by the Hopi tribe will shed light on the complexity of these problems. The Hopi tribe became famous for its kachina dolls, carvings depicting deities. The design for the carvings was centuries old, and developed by the tribe's ancestors. A growing market demand for the carvings led manufacturers in northwestern New Mexico to reproduce similar dolls to flood the market with lower-priced substitutes. "As a result," says author David Jordan, "the Hopi tribe suffered not only from the cultural diminishment of non-native production of spiritual 'embodiments of deities,' but also the devaluation of the economic worth of the hand-carved kachina dolls." David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?*, 25 AM. INDIAN L. REV. 93, 99 (2000–2001).

3 See Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27 COLUM. J.L. & ARTS 211, 220 (2004).

Traditional creative works—perhaps through use of cultural knowledge, use of particular sacred designs or motifs, depiction of certain images or events or through the context in which created or applied—may be of great cultural and spiritual significance. Cultural information is transmitted through these creative works and is therefore crucial to the continuing survival of Native cultures.

*Id.*

4 25 U.S.C. §§ 3001–3013 (2006).

5 Jordan, *supra* note 2, at 103.

6 See *id.* at 104.

Moral rights, which are intended to protect the spirit of the artist as expressed in her work, are capable of providing the protection that Native Americans need. The purpose and structure of moral rights law in Europe comes closer to providing for the Intellectual Property Rights (IPR) needs of indigenous cultures, but U.S. moral rights are so limited that they offer almost no protection to indigenous art. The weaknesses of moral rights law in the United States become an especially important problem to consider because the protections available through the more developed doctrines of copyright and trademark law have proven unhelpful and ineffective for indigenous intellectual property needs.

Moral rights were first recognized in this country in 1990, when the United States passed the Visual Artists Rights Act (VARA)<sup>7</sup> in order to bring its domestic laws into compliance with the Berne Convention.<sup>8</sup> However, VARA is very limited in scope.<sup>9</sup> While touted at the time as an important first step, no amendments have been made in the last twenty years in order to improve the United States Code's protections and bring it closer to international norms.

The narrow moral rights adopted by VARA leave much to be desired for mainstream artists, but they do practically nothing for artists within traditionally oppressed groups. The United States must look at how its indigenous groups are being excluded

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<sup>7</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C. (2006)).

<sup>8</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C. (2006)).

<sup>9</sup> See § 602, 104 Stat. at 5128. (VARA applies only to authors of a "work of visual art." A "work of visual art" is defined to include and exclude specific types of creative works).

altogether from the moral rights regime. Moral rights law should be expanded in the United States because it is the best tool available to protect the intellectual property of Native Americans. While some have recommended using specialized legislation to address the problem, moral rights law presents a better alternative. Using existing moral rights law in other international jurisdictions as a blueprint, we can transition smoothly into providing holistic protection for indigenous artists.

In Part I, this Note will provide an overview of intellectual property rights that affect artists, and specifically will describe the state of existing U.S. moral rights law. Part II will apply these various legal doctrines to Native American cultural expressions, and demonstrate the difficulties that exist with protecting these expressions under current law. Part III will propose that moral rights law is well suited to protect unique aspects of Native American art. While acknowledging that VARA is currently deficient, this Part will argue that other approaches would be much less effective, and that there are no significant barriers to expanding VARA's protections in the United States.

## I. OVERVIEW OF ARTISTS' RIGHTS

### *A. Artists' Rights Around the World: Copyright, Trademark, Royalty Right, and Moral Right*

#### 1. Copyright

Copyright is fundamentally an economic right. It is intended to give the copyright owner control over her work in order to ensure the copyright owner has the ability to

financially benefit from the commercial value of the work.<sup>10</sup> The overarching goal of intellectual property law is to assign an economic value to a good for which there is little economic incentive to create.<sup>11</sup> The assumption is that intellectual property goods are beneficial public goods, which we want to incentivize.<sup>12</sup> Because knowledge goods like songs and literature are non-exclusive and non-rivalrous, they are vulnerable to freeriding.<sup>13</sup> This vulnerability compromises the economic benefit that may have resulted from the goods' creation. States intervene in order to protect the creators of knowledge goods from free riders in order to stimulate the creation of more knowledge goods.<sup>14</sup>

An author does not need to register her work in order to receive copyright protection; copyright resides in the work as soon as the work is complete.<sup>15</sup> Copyright originally resides in the individual author who created the work.<sup>16</sup> U.S. copyright law does not recognize community authorship of a work unless each member of the group played an

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10 See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (Mathew Bender, Rev. ed., 2012).

11 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (Mathew Bender, Rev. ed., 2012).

12 See *Mazer*, 347 U.S. at 219.

13 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (Mathew Bender, Rev. ed., 2012).

14 *Id.*

15 17 U.S.C. § 302(a) (2006) (“Copyright in a work created . . . subsists from its creation . . .”); see also MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 48 (5th ed. 2010) (“[A] copyright comes into existence when an author takes the affirmative step of placing his or her work on a material object such as a piece of paper, digital media (*e.g.*, a CD), or a block of marble . . . [A] copyright is created by the act of an author in fixing the work in a tangible medium of expression.”).

16 17 U.S.C. § 201(a) (2006).

important role in the physical creation of the work.<sup>17</sup> Copyright usually transfers to the new owner if the work is sold, unless the author contracts otherwise.<sup>18</sup> Because copyright does not reside permanently in the artist, if a work is purchased along with the copyright it can be duplicated and used in commerce by an outside party. In this case the author will have lost her rights to exert control over the context and use of her work.

The copyright owner has the rights to control reproduction, adaption, distribution, public performance, and public display of the work.<sup>19</sup> Regardless of whether the author sells the copyright, its duration is the same. For works created in 1978 or later, copyright lasts for the life of the author plus seventy years.<sup>20</sup> But for older works, the copyright protection is shorter.<sup>21</sup> Works that have existed beyond their copyright term (including those which were created before recorded history) belong to the public domain.<sup>22</sup>

Copyright only protects an original expression of an idea that is fixed in a tangible medium.<sup>23</sup> The originality requirement is not a total novelty standard, but only demands that

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17 17 U.S.C. § 101 (2006) (The statutory definition of a “joint work” is “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”); *see also* 17 U.S.C. § 201(a) (“authors of a joint work are co-owners of copyright in the work.”).

18 17 U.S.C. § 201(d) (2006); *see also* 1 JESSICA L. DARRABY, *ART, ARTIFACT, ARCHITECTURE, AND MUSEUM LAW* § 9:4 (2009); 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8C.04 (Mathew Bender, Rev. ed., 2012).

19 *See* 17 U.S.C. § 106 (2006).

20 17 U.S.C. § 302(a).

21 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §§ 9.01, 9.08 (Mathew Bender, Rev. ed., 2012).

22 *See* 17 U.S.C. §§ 302, 303 (2006); Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. L. REV. 137, 157 (2005).

23 17 U.S.C. § 102(a) (2006).

the work was not actually copied from another author.<sup>24</sup> Derivative works are allowed in order to avoid stifling the creative community.<sup>25</sup>

Copyright applies to many kinds of expressions, including literature, photography and other pictorial art, music, dramatic works, choreography, sculpture, motion pictures, sound recordings or sheet music, and architectural works.<sup>26</sup> In addition, useful articles, sometimes called “applied art,” are copyrightable.<sup>27</sup> However, they may be copyrighted only to the extent that their design elements “can be identified separately from, and are capable of existing independently of,” the object’s utility.<sup>28</sup>

## 2. Trademark

Trademark is a body of law that protects artists’ designs and word marks when they are used to identify the source of a good in commerce.<sup>29</sup> Trademarks are used by a seller to identify its goods, distinguish its goods from others, and to indicate the source of its goods.<sup>30</sup> In order to receive trademark protection, the owner must use the mark in

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24 See NIMMER, *supra* note 11, at § 2.01 (“Although in some early copyright cases, the distinction was not recognized, it is now clearly established, both as a matter of congressional intent and judicial construction, that the originality necessary to support a copyright merely calls for independent creation, not novelty.”) (footnotes omitted).

25 *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (“If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we would be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.”); see NIMMER, *supra* note 11, at § 3.01.

26 17 U.S.C. § 102(a).

27 See NIMMER, *supra* note 11, at § 2.08[B][3].

28 17 U.S.C. § 101 (2006) (“pictorial, graphic, and sculptural works”).

29 15 U.S.C. § 1127 (2006).

30 *Id.*



commerce and the mark must be distinctive.<sup>31</sup> Trademark protection includes the right to exclusive use of the mark.<sup>32</sup>

### 3. Moral Rights

Moral rights, on the other hand, are fundamentally personal rights that reside in the artist for her entire lifetime, and cannot be sold.<sup>33</sup> They arose from the French tradition of *droit moral*, and a belief that an artist's personality and reputation are intertwined with the art she creates.<sup>34</sup> The theory of moral rights is that "the artist's personality inextricably inheres in the work during the process of creation."<sup>35</sup> In order to protect the artist's personality, the work itself must be protected; "[m]oral rights thus indelibly imbue the inanimate with aspects of the human psyche."<sup>36</sup> Moral rights include the rights of attribution, integrity, divulgation, and withdrawal.<sup>37</sup> Moral rights generally last for the life of the artist.<sup>38</sup> Therefore, moral rights give an artist a lifelong right to certain control over the art piece.

### 4. Royalty Right

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31 15 U.S.C. §§ 1051(a)(3)(C), 1052(f) (2006).

32 *See* 15 U.S.C. § 1114(1) (2006).

33 17 U.S.C. § 106A(e) (2006); *see also* DARRABY, *supra* note 19, at § 9:2.

34 *See* NIMMER, *supra* note 19, at § 8D.01[A] ("In France, home country to the doctrine, these rights are known as *le droit moral*, or moral rights. "The adjective "moral" has no precise English equivalent, although "spiritual", "non-economic" and "personal" convey something of the intended meaning.") (footnotes omitted).

35 DARRABY, *supra* note 19, at § 9.2.

36 *Id.*

37 *Id.*; *see also* NIMMER, *supra* note 19, at § 8D.01[A].

38 *See* NIMMER, *supra* note 19, at § 8D.01[A].

The fourth kind of intellectual property right in the family of intellectual property (IP) law concerning artists is the royalty right, or *droit de suite*. This doctrine provides a right for the artist to receive royalties for every resale of her work in a public forum,<sup>39</sup> adding a lifelong economic right to the artist's bundle of IP rights.<sup>40</sup> *Droit de suite* is not as widely accepted as a part of moral rights, and it is not recognized at all in U.S. federal law. However, it is recognized and required by the Berne Convention.<sup>41</sup> The main justification for adopting *droit de suite* is that it makes up for other inequities in the copyright system.<sup>42</sup> As the copyright system stands, the artist is not able to benefit from an increase in value of a work after its original sale.<sup>43</sup>

California enacted a royalty resale right in 1976,<sup>44</sup> but the provision was struck down in May of 2012.<sup>45</sup> The court held that the statute violated the Commerce Clause of the Constitution by attempting to regulate sales outside of the state of California.<sup>46</sup> This means

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39 See NIMMER, *supra* note 19, at § 8C.04[A].

40 See *id.*

41 See *id.* at § 8C.04[A][2] ("The Berne Convention, to which the United States has adhered since March 1, 1989, recognizes an 'inalienable right to an interest' in the resale of an original work of art and original manuscript. Given the failure of U.S. law (except California) to accord that protection, this country is arguably failing to honor its Berne commitments under that article.").

42 See Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509, 532–33 (1995); see also NIMMER, *supra* note 19, at § 8C.04[A][1]:

The prime (though not the sole) protection afforded by copyright is the right to control reproductions of a given work . . . Artists' prime source of income derives instead from the sale of the original tangible embodiment of their artistic efforts. The money an artist receives upon the sale of a painting (even if he has reserved reproduction rights) usually represents the only income that he will receive from that particular work.

43 See Reddy, *supra* note 43.

44 CAL. CIV. CODE § 986 (Deering 2012); see also Reddy, *supra* note 43, at 510–11.

45 See *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

46 *Id.* at 1126.

that in order for American artists to gain the *droit de suite*, the right would need to be added to federal law. However, in striking down California's provision the court added, "[n]otably, several attempts by Congress to introduce resale royalty legislation have failed. In December 1992, the Copyright Office issued a report concluding that it was 'not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States.'"<sup>47</sup>

*B. Existing Moral Rights Law in the United States*

The international standard for moral rights is set by the Berne Convention for the Protection of Literary and Artistic Works,<sup>48</sup> and is the starting point for moral rights analysis. Even though it was created in 1886, Berne is still the most important body of intellectual property law in the world.<sup>49</sup> The original purpose of the Berne Convention was to set up international standards in order to ease international trade.<sup>50</sup> It was originally created in 1886, sparked by a controversy when exhibitors refused to attend the 1873 International Exhibition of Inventions in Vienna.<sup>51</sup> Exhibitors refused to attend the

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<sup>47</sup> *Id.* at 1121 (citations omitted).

<sup>48</sup> Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

<sup>49</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299) (The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was created more recently, but it incorporates all of Berne except for the moral rights provisions. No international law preempts the moral rights provisions of Berne; therefore Berne still provides binding intellectual property law for all signatory countries.)

<sup>50</sup> See *WIPO Treaties—General Information*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/general/>.

<sup>51</sup> *Id.*

International Exhibition of Inventors because they were afraid their ideas would be stolen and commercially exploited.<sup>52</sup>

The United States did not join the Berne Convention until 1989.<sup>53</sup> Part of the reason for this delay was that the United States' laws needed to be significantly modified to come into compliance with the treaty, especially in the field of moral rights.<sup>54</sup> However, the United States had a strong interest in joining Berne because the treaty included 85 nations, including all of America's major trading partners.<sup>55</sup> When the United States withdrew from the Universal Copyright Convention, it needed a new venue to influence international copyright standards.<sup>56</sup> As the world's largest exporter of copyrighted works, the United States had a strong interest in joining Berne, the world's largest copyright convention.<sup>57</sup> Organized international piracy of American copyrighted works created a dire situation for domestic authors.<sup>58</sup>

Because the Berne Convention was not considered self-executing, the United States passed the Berne Convention Implementation Act of 1988 (BCIA) in order to join.<sup>59</sup> The BCIA eliminated the notice and registration requirements that were disallowed by the Berne

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<sup>52</sup> *Id.*

<sup>53</sup> See LEAFFER, *supra* note 16, at 577.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 578; see also Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat 2853 (1988).

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Convention.<sup>60</sup> After joining, American artists no longer had to rely on backdoor procedures to protect their works in Berne Convention member countries with which the United States had no other copyright agreements.<sup>61</sup>

However, the United States was still not fully on the same page as the Berne Convention. The BCIA did not incorporate moral rights doctrine into U.S. law, because the Senate had contended the protections already existed under other federal and state laws.<sup>62</sup> By contrast, Article 6bis of the Berne Convention explicitly provides for moral rights, giving artists the rights of attribution and integrity.<sup>63</sup>

In 1990, the United States passed the VARA in order to strengthen its compliance with the Berne Convention.<sup>64</sup> Although the United States' official position was that its laws already protected the artists' rights mentioned in the Berne Convention, it passed VARA to explicitly include its provisions in U.S. domestic law.<sup>65</sup> Thus, while the United States does

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<sup>60</sup> See LEAFFER, *supra* note 16, at 578.

<sup>61</sup> *Id.* at 582.

<sup>62</sup> See DARRABY, *supra* note 19, at 671.

<sup>63</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

(1) independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship [attribution] of the work and to object to any distortion, mutilation or other modification [integrity] of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. . . . (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

*Id.*

<sup>64</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C. (2006)).

<sup>65</sup> See LEAFFER, *supra* note 16, at 671 (quoting 136 CONG. REC. H13313 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier)) ("While [VARA] is not necessary for this country's adherence to the Berne Convention . . . it certainly strengthens our commitment to that convention.").

provide moral rights protection to some artists, the limited scope of its protection leaves the United States lagging behind international moral rights norms.

As indicated by its name, VARA provides protection to a very limited class of artists—those who create visual art.<sup>66</sup> Unprotected authors include anonymous or unknown authors and group authors. This means that a tribe or people group who believe themselves to own their traditional cultural expressions collectively are not authors under VARA.

VARA only protects the moral rights of attribution and integrity.<sup>67</sup> Like other moral rights, VARA provides that the protected rights are not transferable and that they last for the life of the artist.<sup>68</sup> Prior to joining the Berne Convention, the United States provided no post-sale rights for artists. Copyright is presumed to be passed along to the new owner, and any economic rights had to be reserved by contract.<sup>69</sup> VARA now provides lifelong protection for some artists, but its limits are severe. The moral rights not granted by VARA

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66 See 135 CONG. REC. E2227 (daily ed. June 20, 1989) (statement of Rep. Markey). Edward Markey, who helped introduce VARA to the House of Representatives in 1989, stated “I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered . . . this legislation covers only a very select group of artists whose works have been allowed to fall through the existing gaps in our copyright law.” *Id.* Similarly, Representative Carlos Moorhead emphasized that his support for the legislation was based mostly on the fact that it was drafted so narrowly. The reason for this, he explained, is that “[a]n overriding concern throughout the Subcommittee on Courts, Intellectual Property, and the Administration of Justice’s consideration of H.R. 2690, was . . . [to] not impede the efforts of U.S. copyright owners . . . In the subcommittee’s view, this narrow definition is essential to ensuring that the legislation is limited to protecting and preserving qualifying works that exist in single copies or limited editions.” 136 CONG. REC. E3716–17 (daily ed. Nov. 2, 1990) (statement of Rep. Moorhead).

67 § 603, 104 Stat. at 5128–30.

68 *Id.*

69 See DARRABY, *supra* note 19, at 669.

include the right of divulgation and the right of withdrawal.<sup>70</sup> It also does not provide for a resale royalty right, or *droit de suite*.<sup>71</sup>

VARA also provides protection against the destruction of certain types of visual art.<sup>72</sup> This is a subcategory of the right of integrity.<sup>73</sup> However, this protection only applies to works that are deemed of “recognized stature.”<sup>74</sup> Unfortunately, the term “recognized stature” is not clearly defined either in the statute or in case law.<sup>75</sup>

The subject matter not protected by VARA is very broad. Anything that is not visual art is not protected, including music, film, crafts, writings, and folklore.<sup>76</sup> VARA defines visual art to include a “painting, drawing, print, or sculpture . . . or a still photographic image produced for exhibition purposes only.”<sup>77</sup> In addition, a qualifying work must be either a single copy or part of a numbered series of 200 or fewer.<sup>78</sup> For prints, the burden of proof to show that the edition is limited rests with the author.<sup>79</sup> Each copy must be consecutively numbered by the author and must be signed or bear an identifying mark of the author.<sup>80</sup>

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70 See Visual Artists Rights Act of 1990, Pub. L. No. 101–650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C. (2006)).

71 See *id.*

72 § 603, 104 Stat. at 5128–30.

73 *Id.*

74 *Id.*

75 *Id.*; see also DARRABY, *supra* note 19, at 689.

76 See, e.g., § 602, 104 Stat. at 5128.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

Because of the narrow scope of VARA, many genres of art protected by copyright do not receive any moral rights protection in the United States. Some obviously excluded groups are non-visual artforms, such as music and writing. However, other types of artwork are excluded as well. For example, motion pictures have been specifically excluded from VARA protection.<sup>81</sup> The statute also excludes applied art, works made for hire, and.<sup>82</sup> Crafts are not explicitly excluded, but case law has held that embroidery on designer pants, puppets, and theater sets are not works of visual art.<sup>83</sup>

Works published before the passage of VARA will only receive protection if title has not yet transferred from the author.<sup>84</sup> This means that works created by indigenous groups are not likely to qualify for moral rights protection even if the work did fall under the definition of visual art under the statute because of when the copyright originally vested in the works.<sup>85</sup>

## II. APPLYING MORAL RIGHTS LAW TO NATIVE AMERICAN CULTURES

### A. *Traditional Cultural Expressions: Why Copyright Does Not Fit*

Native American cultures have sharply contrasting conceptions of art and expression when compared with the West.<sup>86</sup> The art of Native American cultures is fundamentally

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> DARRABY, *supra* note 19 at 673.

<sup>84</sup> § 610, 104 Stat. at 5132–33.

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., Jordan, *supra* note 2, at 102; Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy*



integrated with their spirituality, their community, and their geography.<sup>87</sup> In the field of IPR, this kind of art has been termed Traditional Cultural Expressions (TCEs).<sup>88</sup> This category includes song, dance, oral traditions, and craft, among others.<sup>89</sup>

From songs to pottery to textiles, traditional cultural expressions are not usually created for the purpose of being sold, but rather as an expression and preservation of their culture.<sup>90</sup> Often TCEs are considered sacred knowledge, and they are not to be shared with outsiders or those without appropriate qualifications.<sup>91</sup> Usually they have been created centuries earlier and have developed over time, keeping them out of the time frame of copyright protection.<sup>92</sup> Some works are not fixed in a tangible medium, which is a

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*Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 13 (2004); Robert K. Paterson and Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT'L & COMP. L. 633, 640 (2003).

87 See Kremers, *supra* note 87.

[Traditional knowledge] is often intimately tied not just to the material object of the knowledge itself, but also to the larger environmental context of the knowledge. Traditional knowledge also is often deeply interwoven with spiritual or sacred concepts, and it is regularly expressed and preserved via ritualistic or artistic traditions that, unlike Western artistic habit, may be executed and passed down through generations only within firmly fixed parameters of expression.

*Id.* (citations omitted).

88 See, e.g., Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG. 71 (2003), <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>.

89 See, e.g., Gervais, *supra* note 82, at 140 and 148.

90 See Paterson, *supra* note 87, at 634.

91 Stephanie Spangler, Note, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L.J. 709, 726–27 (2010).

92 See Kremers, *supra* note 87, at 25 (“Traditional folkloric works may also not be considered ‘original’ in the copyright sense, because they are products of the cultural public domain, are developed incrementally over time, and are often executed according to strictly observed rules to which each successive generation of authors is bound.”).

requirement of copyright.<sup>93</sup> In addition, copyrighted works eventually enter the public domain, which is contrary to the wishes and intentions of Native American creators.<sup>94</sup>

A Navajo representative has elaborated on the depth of meaning of cultural expressions:

A far greater difficulty we have is that the nonindigenous world does not understand that much of our cultural expression is inextricably linked in a holistic way with our spiritual life . . . . There is a propensity [among outsiders] to use terms like “myths” or “dances” for some of our cultural expressions, but these expressions actually have far deeper meaning . . . . We would never presume, by the same token, to call the Bible a “myth.” This is why we don’t want these things out there in the world for marketing. To us, they are sacred.<sup>95</sup>

Because of these differing cultural understandings of art, TCEs do not fit well into the Western copyright regime. The main conflicts with copyright law are that TCEs are too old for protection, they are not fixed in an appropriate medium, they are products of a community rather than an individual author, and they have not been created for the purpose of entering commerce.<sup>96</sup>

### 1. Timing of Creation

TCEs have often been part of a community’s culture for hundreds of years, and have even changed over time.<sup>97</sup> Because the copyright clock starts ticking at the moment of

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<sup>93</sup> See Paterson, *supra* note 87, at 639–40.

<sup>94</sup> See Matlon, *supra* note 3, at 216.

<sup>95</sup> *Id.* at 211 note 4 (quoting Nancy Kremers, *They Thought It First: Indigenous Peoples Push to Protect Their Traditional Knowledge, Genetic Resources, and Folklore*, LEGAL TIMES, Mar. 24, 2003, at IP21).

<sup>96</sup> See, e.g., Gervais, *supra* note 83, at 149–59.

<sup>97</sup> See Jordan, *supra* note 2, at 99 (illustrating that for the Hopi, the design of kachina dolls “dates back centuries, developed by ancestors, generations ago . . . altered only by the erosion of time.”).

creation, even if these expressions did qualify for copyright protection otherwise, they would long ago have passed into the public domain.<sup>98</sup> The very age and rootedness of the tradition that gives such value to the expression makes it unprotectable in Western copyright law.

## 2. Fixation

Another important issue for Native American artists is that copyright law does not protect works unless they are fixed in a tangible medium.<sup>99</sup> This creates a huge gap for expressions that are passed down through oral tradition such as folklore, music, and dance.<sup>100</sup> Author Stephanie Spangler has made the argument that Native American communities should undertake the digital recording of their own intangible TCEs, such as videotaping traditional dances, in order to receive copyright protection.<sup>101</sup> By making themselves the author of the digital recording, they solve the communal authorship problem while simultaneously meeting the fixation standard of copyright law. Then the community can keep the digitization private, use it in commerce, and use it as proof of ownership through enforcement mechanisms.<sup>102</sup> However, because VARA excludes film and motion

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98 See Gervais, *supra* note 23, at 157.

99 17 U.S.C. § 102(a).

100 See Gervais, *supra* note 23, at 157.

101 See Spangler, *supra* note 92, at 725.

102 *Id.* at 725–26.

picture from its protection, recording their works would only provide Native Americans with copyright protection and not with rights of attribution and integrity.<sup>103</sup>

Another complication with this approach is that the copyright resides in the person who actually records or photographs the expression.<sup>104</sup> When non-native people, such as hired photographers or anthropologists, document TCEs, the copyright actually resides in the non-native individual who records and publishes the information.<sup>105</sup> For example, outsiders have gained the benefits of copyright protection when they have translated oral traditions and published them in printed form.<sup>106</sup> And “[s]imilarly, a photograph of an indigenous person in traditional attire confers copyright on the photographer but not on the subject of the photograph.”<sup>107</sup>

### 3. Authorship

Thirdly, TCEs are not created by individual authors, but rather are considered to be communally owned by the tribe.<sup>108</sup> Traditional knowledge, which encompasses TCEs as well as scientific knowledge, has been defined as follows.<sup>109</sup>

[T]raditional knowledge . . . is traditional only to the extent that its creation and use are part of the cultural traditions of a community—“traditional,” therefore, does not necessarily mean that the knowledge is ancient or static; is representative of the cultural values of a people

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103 § 602, 104 Stat. at 5128.

104 17 U.S.C. § 201(a).

105 See Paterson, *supra* note 87, at 639–40.

106 *Id.*

107 *Id.* at 640.

108 See Jordan, *supra* note 2, at 99.

109 See Gervais, *supra* note 23.

and thus is generally held collectively; is not limited to any specific field of technology or the arts; is “owned” by a community and its use is often restricted to certain members of that community.<sup>110</sup>

On the other hand, intellectual property protection applies to “[a]n identifiable author, inventor or other originator (who will be individually rewarded); An identifiable work, invention or other object; and Defined restricted acts.”<sup>111</sup> This distinction between individual versus group authorship and ownership is fundamental.<sup>112</sup> The only way multiple people can own a copyright in the United States is if each author played a significant role in actually creating the work (joint authorship) or if the author transferred ownership to others after its creation and thereby created a jointly owned work.<sup>113</sup> Conversely, the idea of an individual artist having her own property interests is nonexistent in many native communities.<sup>114</sup>

#### 4. Purpose

Finally, TCEs have not historically been created for the purpose of entering commerce.<sup>115</sup> They are meant to function as an expression of culture for the present and a

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<sup>110</sup> *Id.* at 140–44.

<sup>111</sup> *Id.* at 141 (quoting Daniel J. Gervais, *Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT’L & COMP. L. 467, 485 (2003)).

<sup>112</sup> Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 179 (2000) (“It was within this context [the Romantic Period] that the modern author was born—lone genius, independent inventor, creative rebel—and became the cornerstone for Western copyright law, establishing its structure and defining the parameters of the entitlements it extends to copyrightable works.”).

<sup>113</sup> 17 U.S.C. §§ 101, 201.

<sup>114</sup> See Riley, *supra* note 113, at 191.

<sup>115</sup> See Paterson, *supra* note 87, at 634–45.

preservation of culture for the future.<sup>116</sup> These pieces were not originally intended to be purchased by collectors for display in their homes.

In light of this fundamentally different perspective on rights related to art and cultural expression, it follows that the right to benefit economically from the sale of a work may not be the first priority for native groups. When it comes to art that is valued by its creators more for its cultural heritage reasons than for its market price, the right to control distribution and copying are not important solely because of the lost economic benefit. Rather, there is a significant intangible value placed on maintaining the integrity and context of the work.<sup>117</sup>

The very act of using Western intellectual property rules to protect TCEs means buying into the rules and structures that surround the intellectual property regime. This treatment may be conceived of as coercion in its own right. As one scholar explained,

The classic distinctions of commercial objects, aesthetic objects, functional objects, and sacred objects becomes blurred in tribal communities, recognizing and exposing a society that is far more communal, both socially and productively. As such, the American copyright system is inherently contrary to the typical Native American tribal ethos. In addition, the American copyright scheme will continue to starve

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116 See Riley, *supra* note 113, at 190 (“By its very nature, oral tradition is a passing down, a handing off, of creative expression. A work can be reborn and recreated each time it is sung; it takes on the needs of the tribe, defined and redefined by its keepers and by the purposes for which it is called upon.”).

117 Paterson, *supra* note 87, at 658 (“Contemporary instances of appropriation include the use by non-indigenous people of native symbols, songs, dances, words and other forms of cultural expression. Objection to such practices goes beyond a sense of deprivation of economic opportunity. Cultural appropriation is argued to amount to a species of human rights abuse or, at a minimum, an affront to native dignity and sense of self-worth.”) (footnote omitted).

*VARA's Orphans: How Indigenous Artists Can Still Look for Hope in the Moral Rights Regime*

Native American tribes of cultural, spiritual, and intellectual works as individual artists turn their backs on tribal communities for economic gain.<sup>118</sup>

For copyright, that means allowing the work to enter the public domain eventually, as well as assigning an economic value to TCEs.<sup>119</sup> For trademarks, actual use in commerce is required to gain protection.<sup>120</sup> In other words, the TCEs become commodified. Submitting a traditional expression to the copyright regime and eventually the public domain can be in direct conflict with tribal laws that require that the ownership rights must be “held in perpetuity.”<sup>121</sup> These laws are based on the belief that the cultural value of these works is best maintained by tribal control over them.<sup>122</sup>

One scholar says, “[t]he catch-22 that indigenous people are either forced to commodify their own cultural property and thereby perhaps misappropriate its position in the indigenous community or renounce commodification, thus allowing other non-indigenous people to appropriate indigenous cultural traditions, has led to increasing frustration among indigenous communities with existing IPR regimes.”<sup>123</sup>

This problem of purpose creates tension between the customary law of tribal communities and individual Native American artists who choose to reproduce sacred art for sale. The people who break the tribal laws governing art are the ones who gain the

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<sup>118</sup> See Jordan, *supra* note 2, at 102.

<sup>119</sup> See *id.* at 98.

<sup>120</sup> The Lanham Act, 15 U.S.C. § 1051 (2006).

<sup>121</sup> Matlon, *supra* note 3, at 216.

<sup>122</sup> *Id.*

<sup>123</sup> Paterson, *supra* note 87, at 634–35.

protection of copyright “because their tangible, distilled use of the artwork out of its sacred context may pass the originality and fixation requirements of copyright law.”<sup>124</sup>

Even for traditional cultural expressions that are created for the purpose of entering commerce, such as pottery and jewelry made for sale to art collectors and tourists, the rights provided to these artists are very limited. In this case, it is easier to identify a copyright author because the item is more likely to have been created by a specific person who will benefit from the income generated by the work. But it may still not be protected by copyright law because of subject matter issues, as is the case with handicraft.

*B. Traditional Cultural Expressions: Why Trademark Does Not Fit*

Trademark protection is severely limited by the fact that it only applies to marks that are used in commerce.<sup>125</sup> While trademark protection could be used to identify the source of craft or art for sale, the protection has not been used this way. The Indian Arts and Crafts Act (IACA) was intended to have a free trademark program for Native American artists to use to register marks in order to identify their goods.<sup>126</sup> Under the program, the Indian Arts and Crafts Board (“Board”) would apply for trademarks on behalf of Indians and tribes.<sup>127</sup> However, the program has never been implemented because U.S. trademark law requires

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124 Matlon, *supra* note 3, at 212.

125 See 15 U.S.C. § 1051.

126 See Kremers, *supra* note 87, at 73.

127 See *id.* at 75–76.



that the applicant for a trademark be using the trademark in commerce or intend to use the trademark within six months of filing.<sup>128</sup> Therefore, only the Board's own mark qualifies.<sup>129</sup>

Lack of reliable copyright protection combined with the difficulty of attaining the protection of trademark law contributes to the problem of fraud. Native American crafts are often copied and passed off as authentic Native American art. Nancy Kremers elaborates on the ramifications of fraudulent use of TCEs,

Labor-intensive local textiles, jewelry, and cultural artifacts are commonly copied and passed off as the work of indigenous craftspeople by entrepreneurs with access to capital and labor-saving machinery, and the duplicates are usually mass-produced and of poor quality. When cheap knockoffs flood local and export markets, the original artisans may cease working altogether. Traditional skills, methods, and designs, as well as the cultures they reflect, are thus permanently lost.<sup>130</sup>

The IACA targets fraud by criminalizing the offer for sale of a good "in a manner that falsely suggests it is Indian produced."<sup>131</sup> The IACA allows an Indian tribe, Indian, or Indian arts and crafts organization to bring a civil action against anyone who sells a good in a manner that falsely suggests it is Indian-produced.<sup>132</sup> However, the IACA has been criticized because of its requirement that an artist belong to a tribe recognized by the federal or state government in order to receive the protection offered by the act.<sup>133</sup> The IACA also

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128 15 U.S.C. §§ 1051(b), (d).

129 See Kremers, *supra* note 87, at 76.

130 *Id.* at 18 (footnotes omitted).

131 18 U.S.C. § 1159(a) (2006).

132 25 U.S.C. § 305e (2006).

133 See Matlon, *supra* note 3, at 219.

does not provide a remedy when goods are both labeled “Indian-style” and are not intended to mislead, therefore the IACA only protects against intentional fraud.<sup>134</sup>

In addition, the United States Patent and Trademark Office (USPTO) has created a database for Native American Tribal Insignia. The database is used as a reference tool for trademark examiners in order to prevent someone from registering a similar mark in order to falsely associate his or her goods with a tribe.<sup>135</sup> However, tribes who use the database are not afforded other trademark protections. In 2003, the database consisted of only five tribal insignia.<sup>136</sup>

### III. HOW MORAL RIGHTS CAN HELP

Traditional knowledge holders, a diverse group of peoples, differ in their own goals. Some want to control and benefit from their culture being disseminated and commercialized.<sup>137</sup> Others want to prevent their knowledge from being taken by anyone in the outside world.<sup>138</sup>

This dilemma—how to protect the sacred aspects (or, at least, the holistic essence) of TKGRF [Traditional Knowledge, Genetic Resources, and Folklore] via the laws of dominating cultures that tend to view and protect intellectual property as a commodity—is one of the perplexing problems that cuts across all TKGRF sectors and presents one of the thorniest legal issues confronting legislators and scholars.<sup>139</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *See* Kremers, *supra* note 87, at 87.

<sup>136</sup> *See id.* at 91–92.

<sup>137</sup> *See id.* at 46.

<sup>138</sup> *See id.*

<sup>139</sup> *Id.* at 47.

The experiences of the Saami people provide a tangible example of the need for indigenous art to remain in context. A representative of the Saami people group, who lives in the border area between Finland and Norway, spoke at a World Intellectual Property Organization (WIPO) conference to discuss the Saami people's concerns about exploitation of their culture by outsiders who were copying and wearing Saami dress for commercial reasons.<sup>140</sup>

When authentically designed and appropriately worn, this clothing is used within Saami culture to convey extensive and specific nonverbal information about the wearer's family of origin, clan, geographic location, marital status, and other identity factors. When inappropriately worn and inauthentically designed by outsiders, it is robbed of the communication characteristics integral to its design and use in the indigenous society in which it originates.<sup>141</sup>

Because the grounding and policy behind moral rights law is to protect the spirit of the artist and to protect her reputation, it is infinitely better suited to safeguard TCEs of all kinds. Relying on moral rights would also allow a compromise between the competing goals for Native Americans of safeguarding context and internalizing economic benefit. On the other hand, creating a specific legal regime tailored to the needs of TCEs may compromise the strength of copyright protection for artists who earn a living by making art and who fit into the required categories of copyright law.

*A. Strength of Moral Rights Protection if Fully Implemented*

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<sup>140</sup> See *id.* at 16–17.

<sup>141</sup> *Id.* at 17 (footnotes omitted).

Rather than mere economic safeguards, Native American artists seek to protect the holistic essence of their works. A fitting example is the Navajo Nation and their continuing struggle against the secularization of their sacred art of sandpainting.<sup>142</sup> The medicine men of the Navajo (*hatathli*) use sandpaintings during ceremonies in order to summon the Holy People to the ceremony.<sup>143</sup>

During a specified point in the curative ceremony, the *hatathli* and any designated assistants will make a sandpainting on the floor of the *hogan* (a traditional Navajo dwelling). Using five special colors and traditional designs and techniques, the *hatathli* creates sandpaintings by drawing images of the Holy People over most of the sandy floor surface. These images are meant to be the exact pictorial representation of the Holy People; the Holy People are then summoned by the exactness.<sup>144</sup>

After the ceremony is complete, the sandpainting is erased. Permanent drawings are traditionally believed to acquire too much power to be entrusted to the people.<sup>145</sup> “This sacred art is meant to be respected and feared.”<sup>146</sup> Some artists have made sandpaintings permanent and sold them outside of the tribe.<sup>147</sup> This practice is very controversial within the Navajo community.<sup>148</sup>

Moral rights allow the author to maintain a great deal of control over how the work is displayed and how it is used during her lifetime. The right of attribution is key because it

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<sup>142</sup> See Matlon, *supra* note 3, at 233.

<sup>143</sup> See *id.* at 233–34.

<sup>144</sup> *Id.* at 234.

<sup>145</sup> See *id.* at 235.

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 238.

will allow the author(s) to claim authorship even in works being used by others. It will also ensure that whenever a work is displayed it is properly attributed to the tribal author and community. The right of integrity is important in order to prevent the work from being modified. Additionally, the right of divulgation would allow artists to control the terms under which a work is first displayed or exhibited, or decide when it is in fact complete. This right could be vital to help the artist safeguard contextual issues. And lastly, the right to withdrawal may be important in order to allow the author to remove a work from display and keep it within the privacy of her own community.

*B. Possibilities for Improvement of the Current Regime*

As detailed earlier, the moral rights provided by VARA are extremely limited in scope. Indeed, the rights of divulgation and withdrawal are not provided for at all in U.S. law. There is a lack of attribution rights for artists who do not create visual art of the kind detailed in VARA, which leaves out many craftspeople, musicians, and other artists. The right of integrity is also very limited, and only protects destruction of works that are of significant stature.

It is clear that moral rights need to be expanded in the United States beyond the provisions of VARA. However, moral rights still provide a path to a promising future. Congress is constitutionally prevented from providing perpetual intellectual property

ownership because of the limited times provision.<sup>149</sup> However, moral rights doctrine in the United States can be expanded to provide rights of divulgation and of withdrawal, allowing for significant control over contextual preservation and public availability of a work. If moral rights were expanded beyond visual artists to apply to crafts, music, and all other creative works now protected by copyright, many more indigenous art forms would be protected.

Additionally, products of communal creativity can be explicitly included within statutory copyright and moral rights protections, as long as provisions are made to ensure that copyright will not last indefinitely. Currently, copyright duration is defined by the life of the individual artist, but there are other ways of limiting copyright terms.

Such expansions to moral rights provisions would allow Native American artists and communities to protect the embedded spirit within their works. The provisions would also apply to works whether they were on display in a museum, held in private, or sold on the open market. This allows a great deal of flexibility for the law to allow each artist or community to decide what is important to them. These expansions could ease tensions within indigenous communities created by forcing an artist to disrespect or misappropriate cultural heritage if she wanted to use her works for economic gain.

This improvement of moral rights by no means addresses every misalignment between indigenous art and western intellectual property law. But a powerful compromise

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<sup>149</sup> U.S. CONST. art. I, § 8, cl. 8.

can be created by providing freedom for Native American artists to gain economically from their intellectual property while also empowering them to safeguard their cultural values.

*C. Attempts to Address the Unique Needs of TCEs in Other Jurisdictions*

Examination of the ways in which specific jurisdictions have tried to address these problems makes it easier to see that each alternative has a grave weakness. The application of customary tribal law to civil cases in Australia demonstrates the agonizing slowness of a case-by-case approach. Statutory schemes tailored to Native American craftspeople in New Mexico and Alaska provide protections and pitfalls similar to U.S. trademark doctrine.

Two landmark cases in Australia shed light on how these issues are being dealt with around the globe. In *Yumulul v. Reserve Bank of Australia*, an Aboriginal artist sued the Federal Reserve Bank for printing bank notes depicting one of his creations.<sup>150</sup> Yumulul created works for sale depicting traditional Aboriginal stories based on his cultural training.<sup>151</sup> He was given authority by his clan to paint sacred designs, having passed through initiation and revelatory ceremonies in which he learned the designs and what they meant.<sup>152</sup> The case was a dispute over a specific sacred object called the Morning Star Pole. Yumulul had authority to create the sacred object, but claimed that the Reserve Bank had printed a depiction of the object without his or the clan's permission.<sup>153</sup>

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<sup>150</sup> (1991) 21 IPR 481 (Austl.).

<sup>151</sup> *See id.* at 482.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 481–82.

Yumbulul appealed to customary law, giving the clan a group copyright and prohibiting the pole from being reproduced by anyone without the proper training or context.<sup>154</sup> However, the court found that there was no group copyright and that Yumbulul had legally signed a license allowing the pole to be reproduced.<sup>155</sup> The court ignored Yumbulul's argument based on customary law that the clan itself needed to give permission anytime a Morning Star Pole was reproduced.<sup>156</sup> It is worth noting that submitting the Morning Star Pole to copyright protection, regardless of the results of the litigation, will ensure that the design will eventually enter the public domain.<sup>157</sup>

The second case, *Bulun Bulun v. R & T Textiles*, involved an Aboriginal painter, authorized by his tribe to paint traditional designs, and an infringing textile company.<sup>158</sup> Bulun Bulun created and owned a copyright in the work in question, "Magpie Geese and Water Lilies at the Waterhole," as a result of ritual knowledge derived from the tribe.<sup>159</sup> Unlike the holding in *Yumbulul*, the court here considered customary law in its holding. It held that Bulun Bulun owed fiduciary obligations to the tribe in respect to the artistic work, and held that "customary law can be used to provide a foundation for rights recognized within the Australian legal system."<sup>160</sup> The court held that Bulun Bulun held copyright in

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 490.

<sup>156</sup> See Paterson, *supra* note 87, at 641.

<sup>157</sup> *Id.*

<sup>158</sup> (1998) 86 FCR 244 (Austl.).

<sup>159</sup> *Id.* at 244-45.

<sup>160</sup> *Id.* 248.



the artwork not as an independent creator but as a fiduciary of the community who created the work.<sup>161</sup>

While the Bulun Bulun compromise—acknowledging customary law and using it in the Australian court system—is extremely important, it cannot provide a strong solution for the United States. For example, relying on showings of customary law in court would require a slow approach, waiting for cases to come up one by one. And with the vast diversity of Native American cultures and tribal laws within U.S. jurisdiction, such an approach will likely be chaotic at best.

New Mexico, which has a vibrant Indian art market, illustrates the gaps in protection for Native American artists. While the state's Indian Arts and Craft Sales Act (IACSA) provides limited protection, it is not sufficient.<sup>162</sup>

IACSA requires every person selling a product that is represented to be authentic Indian arts or crafts to make due inquiry of his suppliers into the true nature of the materials. While this requirement protects against fraud and false dealing, the IACSA offers only general protection with respect to attribution. The IACSA does not fully effectuate the moral right of attribution because it does not enable the individual Indian artist to be identified as the author of his or her specific works.<sup>163</sup>

The IACSA specifically makes it a criminal offense to offer for sale an article represented as produced by an Indian if it was not actually created by the labor of an Indian.<sup>164</sup> The

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<sup>161</sup> *Id.* 263.

<sup>162</sup> See Channah Farber, Comment, *Advancing the Arts Community in New Mexico Through Moral Rights and Droit de Suite: The International Impetus and Implications of Preemption Analysis*, 36 N.M. L. Rev. 713, 743–44 (2006).

<sup>163</sup> *Id.* at 744 n.344; see also N.M. STAT. ANN. § 30-33-6 (West 2012).

<sup>164</sup> N.M. STAT. ANN. § 30-33-1 (West 2012).

statute is intended to reduce fraud in New Mexico's art market, protecting both artists and purchasers. It is important specifically to address the issue of fraud in Indian craft. However, this type of law only creates protection for works created by an individual artist and which are made for the purpose of entering commerce.

The Silver Hand Program in Alaska was also created to prevent fraud in the market for Native American art.<sup>165</sup> The program functions like a state-owned certification mark and is used to guarantee authenticity of goods being sold as Native American products.<sup>166</sup> Craftspeople must apply to the state for a Silver Hand permit.<sup>167</sup> Once approved, they receive labels bearing the mark for use on their handcrafted goods.<sup>168</sup> The program works to protect craftspeople and consumers alike. It protects artists from exploitation by those who would sell unauthorized copies as originals, thereby benefiting economically from passing goods off as authentically Native American. It also protects consumers by ensuring that what they are purchasing is authentic. In this way, the integrity of the Native American artistic community is protected from dilution by those who would copy their works.

However, like the IACSA in New Mexico, the Silver Hand Program only protects individual Native American artists who are selling their creations to people outside of their communities. It requires an artist to submit her works into the stream of commerce in order for them to be protected in any way.

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<sup>165</sup> See Kremers, *supra* note 87, at 81.

<sup>166</sup> *Id.* at 81–82.

<sup>167</sup> See *id.* at 82.

<sup>168</sup> See Kremers, *supra* note 87, at 81–82.

Reducing fraud by creating statutes and programs like the Silver Hand Program is an important step. However, fraud barely protects against very basic economic dilution and issues of theft. The more complex issues of protecting cultural context and catering to different uses of TCEs go overlooked.

*D. Challenges to the Moral Rights Solution*

The expansion of moral rights law within the United States can be accomplished. While moral rights rest on a different conceptual foundation than our statutory scheme creating economic incentives, there is no constitutional issue with expanding moral rights in the United States. The Constitution provides for intellectual property protection “to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>169</sup> It is unfortunately not possible to provide perpetual intellectual property protection to indigenous artists because of the “limited times” restriction. However, the concept of protecting the spirit of the artist inherent in her work is fully compatible with promoting progress through exclusive rights. Congress has already adopted limited moral rights provisions by passing VARA. Expanding the legislation to provide more complete moral rights to more types of artists and other types of creative works would not present any new constitutional issues.

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<sup>169</sup> U.S. CONST. art. I, § 8, cl. 8.

While traditionally the United States has had a strong focus on economic rights, Congress has proven willing to change copyright policy in order to align themselves with their international trade partners. The focus on protecting indigenous artists is a worldwide movement and is gaining ground within WIPO through initiatives such as the Creative Heritage Project<sup>170</sup> and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore.<sup>171</sup>

Additionally, the federal government has a fiduciary relationship with Native American tribes and has “articulated the importance of ensuring the cultural survival of tribes and shown a general willingness to adopt laws aimed at promoting tribal cultural integrity.”<sup>172</sup> It is foreseeable that the United States would find it beneficial to make these sorts of changes in the future.

States can create their own moral rights laws in order to provide protection for their citizenry until the federal government expands its moral rights laws. In fact, states are in an optimal position to take the lead on moral rights provisions because they know the needs within their own regions. They are familiar with the tribes located within their territories and are also familiar with the nature of the art market that exists within their borders.

The Copyright Act of 1976, and therefore VARA, as a part of the Act, has a preemption clause. This means that state moral rights laws are preempted to the extent that

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170 See *Creative Heritage Project: Strategic Management of IP Rights and Interests*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/culturalheritage/>.

171 Kremers, *supra* note 87, at 50; see generally WORLD INTELL. PROP. ORG., <http://wipo.int/tk/en>.

172 Matlon, *supra* note 3, at 246–47.

they provide rights equivalent to integrity and attribution to works that fall within the subject matter of VARA. Since crafts do not fall into the subject matter of copyright generally, all state regulations related to protecting craft are free from risk of preemption.<sup>173</sup> However, ultimately the patchwork of state laws will not provide the reliable protection that would come from a federal expansion of moral rights. It will also be difficult to provide some protections that affect interstate commerce. Indeed, California's *droit de suite* has been recently struck down after decades of operation for this very reason.<sup>174</sup> CONCLUSION

While Native American artists and communities have many difficulties protecting their artistic expressions under the current legal regime, hope is not lost. The well-developed moral rights doctrine from the civil law tradition is ready and waiting to be implemented more strongly in the West in order to protect not only the economic rights of artists, but their spirit and culture as well.

Moral rights doctrine is well-developed in civil law traditions and can readily be imported into our own IP regime. It is well suited to protecting the personality, the spirit, and the identity embedded within traditional cultural expressions. The protection of the embedded identity is vital because for cultures that often do not have a written language to record their past, creative works are the way they preserve their cultural identity.

No matter how we twist and interpret copyright law, its protections will never meet these needs. Specific legal regimes designed to protect Native American artists may not

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<sup>173</sup> See Farber, *supra* note 163, at 736.

<sup>174</sup> See *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

survive constitutional scrutiny, or may not be adequate for the task. The programs in Alaska and New Mexico are perfect examples, because they only address the issue of fraud. Thus, the economic rights remain the only element that is protected.

Australia's approach has been to combine customary law with civil law in order to recognize the inner rules of tribes that protect their sacred knowledge.<sup>175</sup> But this approach is not practical for the United States. Considering the fact that customary law in cases involving Native Americans will take a long time, and will proceed on a case-by-case basis, it is unlikely to be accepted in our legal system. However, moral rights law, when expanded to protect traditional cultural expressions, will allow native artists to exploit their works economically, to control the dissemination of their art, and to put a stop to the dilution of their culture.

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<sup>175</sup> See discussion *supra* Part III C.